

**STATE OF WISCONSIN
Department of Commerce**

In the Matter of the PECFA Appeal of.

Michael P. Hartnett
Hartnett Oil Corporation
16280 Wildwood Court
Brookfield, Wisconsin 53005
Hearing: #99-93

PECFA Claim: #5309-1542-16

Final Decision

Preliminary Recitals

Pursuant to a Petition for Hearing filed March 28, 1999, under § 101.02 (6) (e) Wis. Stats., and § Comm/ILHR 47.53 Wis. Adm. Code. to review a decision of the Wisconsin Department of Commerce (Department), a hearing was commenced on May 18, 2000, at Madison, Wisconsin. A Proposed Hearing Officer Decision was issued on July 17, 2000 and the parties were provided a period of twenty, (20) days to file objections.

The Issue for determination is:

Whether the Department's Decision of March 3, 1999 correctly denied PECFA reimbursement of costs totaling, \$72,698.64 on the basis that those costs were incurred prior to the required notification to the Wisconsin Department of Natural Resources.

There appeared in this matter the following persons:

PARTIES IN INTEREST.:
Michael P. Hartnett
Hartnett Oil Corporation
16280 Wildwood Court
Brookfield, Wisconsin 53005

By: Thomas P. Herzog, Esq.
Herzog Law Offices
910 Elm Grove Road
P. O. Box I
Elm Grove, Wisconsin 53122

Wisconsin Department of Commerce
PECFA Bureau

201 W. Washington Avenue
P.O. Box 7838
Madison, Wisconsin 53707-7838

By: Kelly Cochrane, Esq.
Assistant Legal Counsel
Wisconsin Department of Commerce
201 W. Washington Avenue, Room 322A
P.O. Box 7838
Madison, Wisconsin 53707-7838

The authority to issue a Final Decision in this matter has been delegated to the undersigned by the Secretary of the Department pursuant to § 560.02 (3) Wis. Stats.

The matter now being ready for Final Decision I hereby issue the following:

FINDINGS OF FACT

The Findings of Fact in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of this Final Decision.

CONCLUSIONS OF LAW

The Conclusions of Law in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of Final Decision.

DISCUSSION

The Discussion in the Proposed Hearing Officer Decision cited above is hereby adopted for purposes of Final Decision.

FINAL DECISION

The Proposed Hearing Officer Decision cited above is hereby adopted as the Final Decision of the Department.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under § 227.48 Wis. Stats. If you believe this decision is based on a mistake in the facts or law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Office of Legal Counsel, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this Final Decision as "PARTIES IN INTEREST".

Your request must explain what mistake you believe the hearing examiner made and why it is important of you must describe your new evidence and tell why you did not have it available at the hearing in this matter. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, Your request for a new hearing will be denied.

Your request for a new hearing must be received by the Department's Office of Legal Counsel no later than twenty (20) days after the mailing date of this Final Decision as indicated below. Late requests cannot be reviewed or granted. The process for asking for a new hearing is set out in § 227.49 Wis. Stats.

Petition For Judicial Review

Petitions for judicial review must be filed not more than thirty (30) days after the mailing of this Final Decision as indicated below (or thirty (30) days after the denial of a request for a rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Office of the Secretary, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" or each party's attorney of record. The process for judicial review is described in § 227.53 Wis. Stats.

Dated:

Martha Kerner
Executive Assistant
Wisconsin Department of Commerce
201 West Washington Avenue
P.O. Box 7970
Madison, Wisconsin 53707-7970

Copies to:

Above identified "PARTIES IN INTEREST", or their legal counsel if represented.

Joyce Howe, Office Manager
Unemployment Insurance Hearing Office
1801 Aberg Avenue, Suite A
Madison, Wisconsin 53707-7975

Date Mailed: January 4, 2001

Mailed By: Linda K. Esser

**STATE OF WISCONSIN
DEPARTMENT OF COMMERCE**

IN THE MATTER OF: The claim for

MADISON HEARING OFFICE
1801 Aberg Ave., Suite

reimbursement under the PECFA
Program by

P.O. Box 797S
Madison, WI 53707-7975
Telephone: (608) 242-481E
Fax: (608)242-4813

Michael P. Hartnett
Hartnett Oil Corp
16280 Wildwood Ct
Brookfield, WI 53005

Hearing Number: 99-93
Re: PECFA Claim # 5309-1542-16

PROPOSED HEARING OFFICER DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of law and order within twenty (20) days from posed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to the Executive Assistant of the Department of Commerce, who is the individual designated to make the FINAL decision of the department in this matter.

STATE HEARING OFFICER:
James H. Moe

DATED AND MAILED:
July 17, 2000

MAILED TO:

Appellant Agent or Attorney

Attorney Thomas Herzog
Herzog Law Office
P.O. Box 1
Elm Grove, WI 53122-0001

Department of Commerce

Kelly Cochrane
Assistant Legal Counsel
P.O. Box 7838
Madison, WI 53707-7838

STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT

In the Matter of the claim for Reimbursement tinder the PECFA Program by

Michael P. Hartnett
and Hartnett Oil Corp.
16280 Wildwood Ct.
Brookfield, WI 53005

Hearing No. 99-93
PECFA Claim No. 5309-1542-16

PROPOSED DECISION

On March 3, 1999, the Wisconsin Department of Commerce (Department) issued a decision denying the request by Michael P. Hartnett and Hartnett Oil Corp. (Appellant) for reimbursement of costs totaling \$72,708.64 under the Petroleum Environmental Cleanup Fund Act (PECFA). The Appellant filed a timely appeal to a portion of the denied costs, and a hearing was held on May 18, 2000 at Madison, Wisconsin, before Administrative Law Judge James H. Moe.

Based on the applicable records and evidence in this case, the administrative law judge makes the following

PROPOSED FINDINGS OF FACT

- I - At all times material, Michael P. Hartnett and Hartnett Oil Corp., were the owners and operators of a gasoline filling station located at 1516 N. Main Street, West Bend, Wisconsin.
2. The Appellants filed a claim for reimbursement of expenses associated with site cleanup at the site in the amount of \$78,220.52. Of that amount, the Department denied reimbursement for costs totaling \$72,698.64¹ on the basis that those costs were incurred for work performed prior to notification of the discharge to the Department of Natural Resources (DNR).
3. On February 25, 1993, the Appellants' consultant sent a facsimile transmission to a DNR program assistant providing notification of petroleum contamination at the property.
4. In July 1996, the Department received the DNR file, as that file was transferred to the Department. That file contained a "responsible party" letter, dated December 5, 1994, sent from the DNR to the Appellants, which indicated that the DNR "has been notified that petroleum contamination was discovered November 10, 1994" at the referenced site.
5. The Department concluded that the November 10, 1994 date constituted the DNR notification date and denied reimbursement of those costs incurred prior to that date.

¹ The Department also denied reimbursement of tank removal costs totaling \$10.00. The Appellants withdrew their appeal contesting denial of reimbursement of those costs.

RELEVANT LAW

Wis. Stat. § 101.143 (3), provides in relevant part as follows:

- (3) CLAIMS FOR PETROLEUM PRODUCT INVESTIGATION, REMEDIAL ACTION PLANNING AND REMEDIAL ACTION ACTIVITIES. (a) *Who may submit a claim.* An owner or operator ... may submit a claim to the department

for award under sub. (4) to reimburse the owner or operator ... for eligible costs under sub. (4)(b) that the owner or operator ... incurs because of a petroleum products discharge from a petroleum product storage system if all of the following apply:

6. The owner or operator...reports the discharge in a timely manner to...the department of natural resources, according to the requirements under s. 292.11.

Wis. Stat. § 292.11 **Hazardous substance spills.** (2) NOTICE OF DISCHARGE. (a) A person who possess or controls a hazardous substance or who causes the discharge of a hazardous substance shall notify the department immediately of any discharge not exempted under sub. (9).

Wis. Admin. Code § ILHR 47 provides as follows:

47.30(2) **EXCLUSIONS FROM ELIGIBLE COSTS.** The department has identified various costs determined to be ineligible for reimbursement. Section 101.143, Stats. lists specific cost items which may not be reimbursed under the PECFA program. In order to control costs and provide awards for the most cost-effective remediations of petroleum-contaminated sites within the scope of this chapter, the following costs may not be reimbursed:

4. Any costs, excluding an emergency action, incurred before a confirmed discharge is reported to the DNR.

PROPOSED DISCUSSION

The Appellants contended that the DNR notification date was February 25, 1993 while the Department contends that the DNR notification date was November 10, 1994.

At the administrative hearing level, the burden is upon the Appellant to establish that the denied costs are eligible for reimbursement under the PECFA program. In this case, the Appellant presented testimony from its consultant's senior project hydrogeologist, who testified that he personally sent a facsimile transmittal to a DNR program assistant on February 25, 1993 reporting contamination at the Appellants' site. A departmental witness conceded that the facsimile transmittal (exhibit 2), if received, was sufficient to meet the DNR notification requirement at issue here. The consultant's credible testimony was the only competent and persuasive firsthand evidence in the record to establish when DNR notification occurred. Moreover, a May 5, 1993 initial PECFA claim call sheet (exhibit 7), completed by the consultant, indicating that the claimant had contacted DNR and that the DNR contact person was Ms. Giselle Red is consistent with his hearing testimony. Similarly, in 1996 the consultant advised the department of the February 1993 transmittal to DNR (see exhibits 10 and 11).

Having concluded that the Appellant has made a *prima facie* case, the burden shifts to the Department to rebut or otherwise refute such testimony establishing the date of transmission to the DNR. The Department asserts that it has no authority to change the notification date as determined by DNR. However, the Department presented no evidence to establish whether or not the DNR received the February 25, 1993 facsimile transmittal. The responsible party letter, upon which the Department relies for its DNR notification date, can be interpreted to mean either that DNR notification occurred on November 10, 1994, or that contamination was discovered on November 10, 1994. The letter's meaning is not clear from its text. Moreover, the Department presented no other evidence, such as a date-stamped letter or facsimile transmission, to establish when DNR actually *received* notification.

Under the circumstances, the consultant's actions on February 25, 1993 constituted notification or reporting within the meaning of the law. In the absence of any evidence to refute or rebut that testimony, the Appellant is entitled to rely on the presumption that a document sent has been received. Nothing in the statutes or the administrative code explicitly requires receipt of such notice or reporting by the DNR.

PROPOSED CONCLUSIONS OF LAW

The Appellants were owners or operators of a property covered by the remedial provisions of Wis. Stat. § 101.143.

On February 25, 1993, the Appellants, through their consultant, reported a confirmed discharge at the site to the DNR.

The Department incorrectly denied reimbursement of costs totaling \$72,698.64 on the basis that those costs were incurred prior to DNR notification, within the meaning of Wis. Stat. § 101.143(3)(a) and Wis. Admin. Code § ILHR 47.30(2)(a)4.

PROPOSED DECISION

The Department's decision to deny all contested amounts on the basis that those costs were incurred prior to DNR notification is reversed. This matter is remanded to the department to determine whether those costs are otherwise eligible for reimbursement under the PECFA program.

Dated: July 17, 2000

James H. Moe
Administrative Law Judge
Acting as Hearing Examiner for the
Department of Commerce

99-93/jhm